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OF THE

Supreme Court of the United States

JANUARY TERM 1954

No. 523

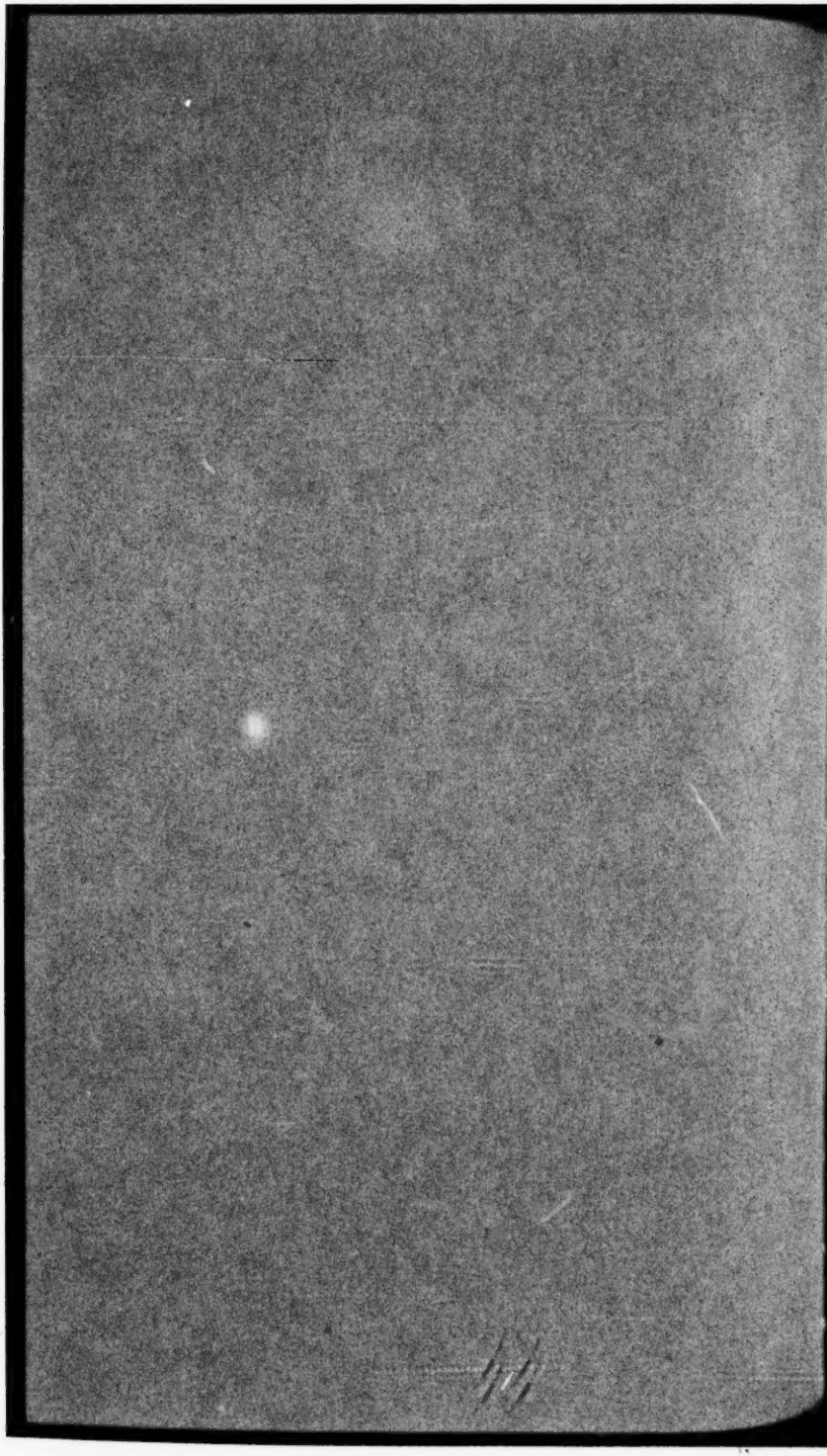
REBECCA SWIRSKY and SARA MILLER,
Petitioners,

v.

KNICKERBOCKER CORP., GEORGE BEALEY CO., INC.
and GRACE E. COFFEEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

JACOB KRESS, GEORGE LANDAU,
Counsel for Petitioners



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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

Rebecca Swidler and Sara Miller, the petitioners herein (plaintiffs below) pray that a writ of certiorari issue to review the judgment of the Court of Appeals, State of New York, entered in the above entitled case on July 31, 1953, affirming a judgment of the Supreme Court, Nassau County.

Opinions Below

The memorandum opinion of the trial court (fols. 997-1002) is not officially reported. The decision of the Appellate Division, Second Department, State of New York is reported in 281 App. Div. 718.

The opinion of the Court of Appeals, State of New York is reported in 305 N. Y. 527. The opinion of the Court of Appeals on the motion for reargument and to amend the remittitur is reported in 306 N. Y. 600.

Jurisdiction

The judgment of affirmance of the Court of Appeals of the State of New York was entered on July 31, 1953. A motion for reargument and to amend the remittitur was filed, and submitted on October 5, 1953. It was decided on October 22, 1953. The petitioners' motion for reargument was denied. The motion to amend the remittitur was granted and it was amended to set forth that a federal constitutional question was presented, necessarily passed upon, and decided adversely to petitioners.

The action was tried before the court without a jury. No findings of fact or conclusions of law were made.

Petitioners raised the constitutional questions set forth in the amended remittitur, before the trial court, the Appellate Division of the Supreme Court of the State of New York, Second Department and the Court of Appeals of the State of New York. Attention is respectfully called to the portions of the complaint, printed at folios 33-82 of the record on appeal.

The writ is addressed to the Supreme Court of the State of New York, County of Nassau, that being the Court possessed of the record.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1251(3).

Question Presented

The Court of Appeals stated the question as follows:

Whether the judgment herein, by permitting the prior partition action judgment to validate the tax deed which had been obtained without notice to the owners, although the order for service by publication of the summons in the partition action dispensed with mailing the summons, constituted the taking of property without due process of law, in violation of the Fourteenth Amendment to the Constitution.

Statutes Involved

The pertinent statutory provisions are printed in Appendix A, infra, pp. 19-29.

Statement

Petitioners purchased real property and received a deed from one who had bought from the Laffeys. Some months later, they learned that there had been a sale of a tax lien of $51, followed by a tax deed, which had been recorded prior to the deed from the Laffeys; also that, some four months after petitioners took title, a judgment had been entered in a partition action, which assumed to validate the tax deed which had been given without notice to the Laffeys.

Petitioners, not having been joined as defendants in the partition action commenced this action to clear their title. They joined as defendants the parties to the tax lien purchase and Gresa which purchased from them. The chief defense is the judgment in the partition action.

Specifications of Errors to Be Urged

The Court of Appeals erred:

1. In holding that the tax deed was conclusively valid though no notice to redeem was given.

2. In depriving petitioners of their right to redeem by holding that it had been cut off in the partition action even though the statute says the right to redeem continues until terminated in an action as provided in § 5:51.0 of the Nassau County Administrative Code.

3. In holding that the judgment in the partition action was valid although granted upon service by publication, mailing having been dispensed with.

4. In affirming the judgment of the Supreme Court, Nassau County.

Reasons for Granting the Writ

The virtually undisputed facts are set out chronologically in the opinion of the New York Court of Appeals. The basic conclusions made by that court are:

1. The tax deed, though given without notice, is, nevertheless, conclusively valid;

2. Petitioners had only a right to redeem, as non-notified owners;

3. This right to redeem could be and was wiped out in the partition action; and

4. The service of the Laffeys in the partition action was validly made.

Whether petitioners, themselves, had a right to attack the tax deed, or only a right to redeem, both were destroyed by the judgment in the partition action, even though petitioners were not parties defendant. If, because petitioners may be bound by the action against the Laffeys, there was, however, no proper service of process on the Laffeys, petitioners' property has been taken without due process.

In the interests of brevity, at this time we shall refer only briefly to two of the three federal questions which are present here:

1. The New York court held that the tax deed was conclusively valid though no notice was given. This is contrary to *Marx* v. *Hanthorn*, 148 U. S. 172, 13 S. Ct. 508, 511, which says that such deeds are only presumptive evidence.

2. The New York court held that petitioners' right to redeem could be cut off in a partition action even though the statute says this right to redeem continues until terminated by a judgment in a Code action (§ 5-51.0 of the Nas-

sau County Code). This is contrary to *French* v. *Edwards*, 13 Wall. 506, 511, and *Lyon* v. *Alley*, 130 U. S. 177, 9 S. Ct. 480, 483, which held that these tax protections are mandatory and must be strictly followed or the acts done will be invalid.

The third federal question involves service of process in the partition action. Service on the Laffeys was made by publishing the summons in the local newspapers alone, the mailing of the summons being dispensed with by order of the court. Concededly the Laffeys had no actual notice of this action, and they defaulted. On this service, the judgment in partition was entered *four months after* petitioners acquired title. The service itself was not constructively made on the Laffeys until about two months after petitioners acquired title.

The question here is whether there was sufficient excuse to justify subjecting this real property to the hazard of forfeiture arising from constructive notice by newspaper.[1] We say there was not.

The decision here does not involve consideration of questions of fact; the facts are undisputed. The question, rather, is by what principles of law are the conceded facts to be judged.[2]

This Court has said that process which is a mere gesture is not due process; that the means employed must be such as one desirous of actually informing the party, might reasonably adopt to accomplish it. Publishing the summons alone is not realistic; only the mailing serves the

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[1] *City of New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293, 73 S. Ct. 299, 301.

[2] "State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact." *Norris* v. *Alabama*, 294 U. S. 587, 590, 55 S. Ct. 579.

purpose of informing the party.[3] In this connection, compare *Wuchter* v. *Pizzutti*, 276 U. S. 13, 48 S. Ct. 259, with *Hess* v. *Pawloski*, 274 U. S. 352, 47 S. Ct. 632, where only a requirement for mailing saved one statute from proscription and the lack of it condemned the other.

As known defendants, the Laffeys were entitled to have the summons mailed to them, whether the New York statutes so provided or not. Before this mailing could be properly dispensed with, the efforts to ascertain mailing addresses should have been such as "one desirous of actually informing the absentee might reasonably adopt to accomplish it."

In this case, the New York courts have proceeded on the theory that present a showing of effort to serve personally, and nothing more, mailing may be dispensed with in an order for "service by publication." This, though there were sources for obtaining mailing addresses, which the process servers knew, but ignored; there were also other sources, such as public records, which the process servers should have found by ordinary diligence, but likewise chose to ignore.

A person may register his address as care of his attorney, or care of his bank, and yet not be available for personal service. Or his address may be gleaned from the public property records, but likewise not be available for personal service. This inability to serve personally may warrant an order for service by publication; it does not warrant dispensing with the mailing.

Calling this type of constructive service "service by publication" has undoubtedly been a contributing factor towards neglecting the importance of the mailing. The opinions of the New York courts (there were no formal findings of fact or conclusions of law) indicate this misconception. The trial court said (fol. 999):

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[3] *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 657.

> "The evidence reveals, and the court finds, that extensive efforts were employed to obtain personal service of the summons and complaint in the partition action."

The Court of Appeals, though determining that the service was proper, says (p. 535 of the reports):

> "Of course, it is true, as it always must be true as to actually living persons, that sufficient further search (such as inquiring from lawyers who had represented them years before, etc.) would have found them, but that objection could be made as to any order of publication against missing persons."

And a proper objection it is indeed, if mailing is dispensed with. The standard established by the highest court of New York is hardly in the spirit and philosophy which this Court has said due process is. At what point is there this "sufficient further effort"? By its judgment, the New York court has said, the whim or judgment, the honesty or dishonesty of the process server makes this determination; on the decision of the process server, important property rights are then to be subjected to the hazard of forfeiture arising from constructive notice by newspaper.

We say that the person, attempting confiscation as here, though it may be legally permissible, if validly done, carries a heavy burden of seeing to it that the attempt to notify, as well as the notice, is not a mere gesture; care must be taken to see that fiction does not deny the fair play; a judgment entered on such service is contrary to natural justice.

This question of service is important and constantly recurring. In the 1946 tax lien sale alone, clients of Mr. Hurley's office purchased over 1000 liens of which only 800 were redeemed (fol. 305). Presumably, the other 200 were proceeded against by action to bar, as here; and, of course, service by publishing without mailing, as estab-

lished by the Court of Appeals, is now accepted practice and precedent.

Mrs. McGinity, the lawyer who conducted the partition action, had 25 years of experience in these tax sales (fol. 305). She was therefore familiar with the Nassau County Administrative Code. This statute (§ 5:51.0) prescribes the requirements for "service by publication." Whether the partition action was governed by this or not, the statute prescribed a standard for due process. In her affidavit of March 28, 1949, she says that the records of the county treasurer and county surrogate were examined (fol. 680). In these offices, Mrs. McGinity and Mr. Keyes, her process server, say they found the following information:

The County Treasurer

They found Thomas Laffey's address, registered for receiving tax bills, as 134 West 71st Street, New York City. Tax bills for years previous to 1946 as well as for 1947 and 1948 were sent there and received by him. In the affidavits, they say 134 West 71st Street was the original address of Catherine Laffey in her 1906 deed (fol. 676). On the trial, Mrs. McGinity admitted this was an error in typing (fol. 320). At any rate, Mrs. McGinity in 1948 sent the notice to redeem to Catherine Laffey by registered mail at that address. Being dead, she could not sign nor could anybody sign for her, and the registered letter was returned. But the fact is that mail addressed to Thomas Laffey at that address was received by him. If they had mailed the summons to Thomas Laffey it would have been received by him.

The County Surrogate

Mrs. McGinity, herself, saw the administration and estate tax papers in the Surrogate's Court and said so in her affidavit (fols. 672-673). At the trial, she said she

saw them before starting the partition action (fol. 353); that she either did not notice that Cadwalader, Wickersham & Taft were attorneys for the Laffeys, or if she had seen it, that fact meant nothing to her (fol. 365).

Mr. Keyes, the process server, also examined the records of the Surrogate's Court and reported his search to Mrs. McGinity; that the names of these attorneys in the papers "skipped me" (fol. 290).

Also on file was a designation by Thomas Laffey, authorizing the clerk of the Surrogate's Court to accept service. Mrs. McGinity undoubtedly knew the practice in these matters, as a lawyer of 25 years' experience in these matters.

Here were public records which Mrs. McGinity and Mr. Keyes admittedly saw, but ignored. The fact is that Cadwalader, Wickersham & Taft were representing the Laffeys at that very time, in the sale of this property. The New York court, itself, referred to this as a customary source of reference in these matters. Mrs. McGinity, herself, went to the attorney for one of the other parties in this very action (fol. 678), so she, too, knew this common practice.

So much for the evidence which the attorney and the process server concededly saw and knew. There was another public record, which they denied having seen but which reasonable diligence required them to examine. In fact, they did claim to have examined the county clerk's records, but claimed they did not see the record of the deed from the Laffeys.[4]

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[4] The exact words in Mrs. McGinity's affidavit (fol. 679):

> "Deponent has caused the records in the office of the Clerk of the County of Nassau to be searched and has found no record of any conveyance or instrument affecting the title to any of said parcels, made by any of the said defendants since the time they acquired title."

The County Clerk

On January 28, 1949, there was recorded in the office of the county clerk of Nassau County, a deed for this very property from all the Laffeys which set forth all their addresses.[5] There was also recorded a mortgage which likewise listed their addresses.[6] By New York law, this was constructive notice to all.[7]

We say that likewise in determining the obligation of process servers who are required to exercise due diligence, as matter of law, they, too, should be charged with the knowledge which they would have acquired from this public record. The deed covered the very property in question here. The deed gave the addresses of the Laffeys to which the summons could have been mailed to them.

The Statute required that they examine the records of the county clerk

> "for ascertaining places where such defendant resides or could be found or would be likely to receive matter transmitted to him through the mail."

But aside from the Statute, experienced tax people such as Mrs. McGinity knew the county clerk's records were sources of information which they should investigate.

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[5] Their addresses were given as follows (fols. 618-619):

Thomas J. Laffey, Sr.	—48 West 87th St., New York
Thomas J. Laffey, Jr.	—Pickwick Arms Hotel Greenwich, Connecticut
Mary C. Laffey	—21 West 91st St., New York
Cecelia M. Laffey	—Administratrix of Joseph A. Laffey—1519 Castle Hill Avenue, Bronx, New York

[6] Ex. 13, fol. 631.

[7] *Foss* v. *Riordan*, 84 N. Y. Supp. (2) 224, aff'd 273 App. Div. 982; *Fidelity & Deposit Co.* v. *Queens Co. Trust Co.*, 226 N. Y. 225, 233.

Their failure to do so would be a lack of reasonable diligence.

Had Mrs. McGinity and the process server followed the statutory direction or reasonable diligence (the terms are synonymous), they would have discovered the addresses of all the Laffeys to which the summons could have been mailed. But Mrs. McGinity, though she swore in her affidavit of March 28, 1949 that she had made the search, did not actually do so. At the trial (fol. 322) she testified that the search was made prior to the filing of the lis pendens in January 1949.

An order for service of process by publication should be based on facts existing at the time it was made or within a reasonable time prior thereto. Due diligence exercised some time before does not take into account that more current search, as here, could disclose the whereabouts of the defendant.[8]

We did contend that this statement, made unequivocally on March 28, 1949, was false at the time it was made. As of March 28, 1949, it was concededly untrue in view of the deed recorded on January 28, 1949. The trial court held that it was not false because what Mrs. McGinity meant—though she did not say so in her affidavit—was that the search was made prior to the filing of the lis pendens over two months before.

If the view of the New York court is correct, viz. that the affidavit meant that the search of the county clerk's records was made prior to January 20, 1949, then, as matter of law, the affidavit is insufficient as not satisfying due diligence. Here was a definite source where mailing addresses were available; yet the highest court in New York says search here is unnecessary.

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[8] See 50 C. J. 529; *Myers* v. *Purdy*, 108 Okla. 147, 149, 150, 234 P. 638; *Forbes* v. *Hyde*, 31 Cal. 342.

The fallacy of this, as a legal conclusion, is easily demonstrable. Suppose a lis pendens is filed. Then, as here, a party files a paper in the county clerk's office, in which he says that if he is to be served in the action, his address for service is as stated in the paper. This paper, the deed here, is indexed in the county clerk's office, right underneath the lis pendens.[9] Yet the Court of Appeals says this may be disregarded completely. This is incredible.

Even if the Laffeys were chargeable with constructive notice of the existence of the suit by the filing of the lis pendens, they still had a right to be served with proper process. In the *City of N. Y.* case, 344 U. S. 293, 73 S. Ct. 299, note 1, supra, the City actually knew of the reorganization. It was argued that knowledge put a duty on the City to inquire. That argument was rejected; the creditor was still entitled to notice that the claim would be barred.

Here, the facts are even stronger. The notice to the Laffeys was not actual but, at best, constructive. The action might never be prosecuted—in fact, the invalid tax deed without notice made the partition action vulnerable to any attack. The Laffeys were out of title, though they did own a mortgage. Even if they had known of the action, they had a perfect right to wait, as did the City in the case supra, until they were served, before acting. True, if the service were valid, they ran the risk; but because they did not act, the service, otherwise bad, does not thereby become good.

A lis pendens may be effective to determine who are necessary parties to an action. So, a person whose rights accrued after a lis pendens might not be heard to complain if not joined as a defendant. But what relationship

[9] On the "unit property card" of Nassau County, introduced into evidence by Knocklong as its Ex. H (page 270) are listed all documents affecting this particular property. Listed are the deeds, mortgages and notices of pendency.

a lis pendens can have to the issue of diligence in service, is somewhat difficult to understand.

The New York court, in justifying the failure to mail, referred to a local custom in Nassau County to the effect that the lis pendens is a cut-off point at which efforts to ascertain the address of a defendant are ended. Such blessing by the highest court of New York makes it incumbent on this Court to overrule this holding as contrary to recognized concepts of due process.

Aside from this, the custom, if any, just cannot have any validity in Nassau County. The Code of that county is exactly to the contrary. In the requirements for service by publication (§ 5:57.2), it says that the affidavit is to be made by a person

> "employed to serve the summons."

It then recites the efforts to be made to serve the summons before publication may be resorted to.[10] Obviously, the summons and the lis pendens are "born" at the same time. In this case they are both dated January 13, 1949 (Ex. No. 1, fol. 833; Ex. No. 2, fol. 838).

How, then, is it possible to have a custom where the search to serve the summons is ended before the summons is "born"?

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[10] Sec. 5-57.2 of the Nassau Code requires that the affidavit show (see Appendix):

> "3. That the deponent has searched and inspected the records in the offices of the county clerk, the county treasurer and the surrogate of the county, for the purpose of making such service and *ascertaining places where such defendant resides or could be found or would be likely to receive matter transmitted to him through the mail.*" (Emphasis ours.)
>
> "4. The last address of the defendant ascertained by or otherwise known to the deponent, to the best of his knowledge and belief and a statement that his knowledge has been acquired from and his belief is founded upon his searches, and inspection of the records in the offices of such clerk, treasurer and surrogate."

The New York courts would have had no difficulty deciding this case correctly if they had applied correctly the principles established by this Court in cases such as *McDonald*, *Mullane* and *City of New York*.[11]

The original trial court judged the case as though the sole question was whether a particular statement in the affidavit upon which the order dispensing with the mailing, was false.[12] Deciding that the particular statement was not false, it concluded that the service was valid and that the partition judgment barred petitioners' rights.

The Court of Appeals erected false bastions around the issue and then rejected petitioners' appeal on the ground that they had failed to scale them. These false bastions are:

1. It could not disturb the trial court's finding that the statement in the affidavit was not false.
2. The affidavits, on their face, appearing sufficient, the publication order cannot be attacked collaterally.
3. The prior judgment must be so far invalid as to amount to a denial of due process.
4. The attorney's affidavit must be proved so fraudulent as to make the order, the service and the judgment absolutely void.
5. The petitioners have a heavy burden to establish that in issuing the order for publication, the county court was defrauded.

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[11] *McDonald* v. *Mabee*, 243 U. S. 90, 37 S. Ct. 343; *Mullane* v. *Central Hanover Bank*, 339 U. S. 306, 70 S. Ct. 652; *City of New York* v. *New York N. H. & H. R. Co.*, 344 U. S. 293, 73 S. Ct. 299.

[12] The trial court said (fol. 999):

> "Many contentions are raised by both parties but it is apparent to this court that the sole issue to be decided is whether the affidavit referred to in the above quotation was constructively fraudulent."

6. There must be clear proof of actual and not constructive fraud.

But for this erroneous underlying philosophy and concept, the New York court itself would have been bound to find that there was no justification for dispensing with the mailing. It virtually conceded this when it said that

> "sufficient further search * * * would have found them * * *."

In the review by this Court, it is free to inquire if the notice and opportunity to be heard in the partition action were such as the Constitutional command of due process prescribes.[13]

In this Court, the burden of showing that the court in the prior action had jurisdiction, is on the party asserting the estoppel.[14]

In this Court, while a presumption of regularity attaches to a judgment, the presumption continues only until contrary evidence appears, whereupon the presumption disappears and has no place in the case.[15] The New York

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[13] This Court said in *Hansberry* v. *Lee*, 311 U. S. 32, 61 S. Ct. 115 at page 115:

> "But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata is challenged for want of due process, it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."

See also *Grannis* v. *Ordean*, 234 U. S. 385, 34 S. Ct. 779, 783; *Scott* v. *McNeal*, 154 U. S. 34, 14 S. Ct. 1108; *Priest* v. *Las Vegas*, 232 U. S. 604, 34 S. Ct. 443.

[14] *Old Wayne Mut. L. Asso.* v. *McDonough*, 204 U. S. 8, 27 S. Ct. 236, 239.

[15] *Mecker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 35 S. Ct. 328, 335. Also, *Old Wayne*, *supra*, at p. 238.

court held, in effect, that the prior judgment was itself conclusive of its regularity. In fact, one judge voted to affirm on the ground that the jurisdictional defect did not appear on the face of the record.

This Court has always held that extrinsic evidence may be offered to show that there was no proper service.[16] The New York court said that if the affidavits on their face appear sufficient, the order is not jurisdictionally defective, citing *Kennedy* v. *Lamb*, 182 N. Y. 228.

With these principles as a guide, this Court may examine to see if there was real—not lip-service—effort to notify the Laffeys.

1. In looking for the owners to whom the statutory notice to redeem was to be given, they disregarded the search in the Surrogate's office; so they did not discover that the Laffey heirs were the owners, not Catherine Laffey, who died 28 years before.

2. In finding the address, they made another "mistake" in assuming that 134 West 71st Street was the address of Catherine Laffey in her 1906 deed. It was Thomas Laffey's address filed in the tax office.

3. Knowing that their mistake had deprived the Laffey heirs of notice and a right to redeem, they nevertheless started a partition action, although the statute prescribes a so-called Code action; this, so that they would not be required to offer a right to redeem in the complaint.

It is against this background that we consider the "oversights" in the service in the partition action which resulted in dispensing with the mailing. The efforts would seem to be a great pretense at looking for the Laffeys in places where it was clear they "were not", at the same time ignoring sources which would unerringly lead them to places where the Laffeys "were".

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[16] *Adam* v. *Saenger*, 303 U. S. 59, 58 S. Ct. 454, 456; *Milliken* v. *Meyer*, 311 U. S. 457, 61 S. Ct. 337, 342.

In addition to all this, there is the following which the New York court referred to in its opinion:

> "December 11, 1946—the County Treasurer of Nassau County sold these premises for unpaid second half 1946 school taxes of $51, to defendants here, Connolly and Knocklong; it seems undisputed in the record that the property was worth several thousand dollars and was afterwards sold to plaintiffs for $10,000 and to defendant Gresa for $6,000; it is undisputed, too, that defendant Connolly, one of the tax purchasers, was a sister of the special tax counsel for the County Treasurer of Nassau County, that defendant Knocklong was a corporation which had its office in the tax counsel's office, and that the lawyer who afterwards acted in the partition suit for Knocklong was a sister and office associate of the special tax counsel."

All this the court said might be considered "suspicious circumstances" but no actual fraud. We say it is. But if not fraud, it certainly goes to the essence of "natural justice", which is due process. Until this Court spoke out in *Tumey* v. *State of Ohio,* 273 U. S. 510, 47 S. Ct. 437, against a practice wherein a judge had a pecuniary interest in fines he levied, even the highest court of Ohio saw nothing wrong in the practice. We say this Court should now speak out against this practice in Nassau County, where are involved properties worth millions of dollars.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB KRISEL, GEORGE LESSALL
Counsel for Petitioners.

January 4, 1954.

APPENDIX A

NEW YORK CIVIL PRACTICE ACT

CH. 144 LAWS OF NEW YORK 1946

§ 232. IN WHAT ACTIONS ORDER FOR SERVICE OF SUMMONS BY PUBLICATION MAY BE MADE.

An order directing the service of a summons upon a defendant, by publication, may be made upon the application of the plaintiff as specified in sections two hundred thirty-two-a and two hundred thirty-two-b of this act, in any of the following actions:

* * * * * * *

2. Where the complaint demands judgment that the defendant be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property.

* * * * * * *

§ 232-a. PERSONS AGAINST WHOM ORDER FOR SERVICE OF SUMMONS BY PUBLICATION MAY BE MADE.

The order may be made where in a cause of action specified in section two hundred thirty-two of this act, the defendant

* * * * * * *

5. Is a natural person and is not a resident of the state; or

6. After diligent inquiry, remains unknown to the plaintiff or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state; or

7. Is a resident of the state and has departed or is about to depart therefrom with intent to defraud his creditors

or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or

8. Is an adult and a resident of the state, has been continuously without the state more than six months next before the granting of the order and has not made a designation, provided for by statute, of a person upon whom to serve a summons in his behalf, or a designation so made no longer remains in force, or service upon the person so designated cannot be made within the state after diligent effort; or

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§ 232-b. PAPERS UPON WHICH ORDER FOR SERVICE OF SUMMONS BY PUBLICATION MAY BE MADE.

The order must be founded upon a verified complaint showing a cause of action specified in subdivisions one or two of section two hundred thirty-two of this act against the defendant to be served or upon a verified complaint showing a cause of action to recover a sum of money only against the defendant to be served and proof that a levy has been made upon property within the state of such defendant under a warrant of attachment granted in such action, together with proof by affidavit of the additional facts required by section two hundred thirty-two-a of this act, and also, where the application is made upon the ground that the defendant is a foreign corporation, a joint stock association or other unincorporated association, or a domestic corporation whose name remains unknown to the plaintiff after diligent inquiry, or after diligent inquiry the plaintiff is unable to ascertain whether the defendant is a domestic corporation, or is not a resident of the state, or is a stockholder of a corporation or joint stock company, that the plaintiff, with due diligence, has been or will be unable to make personal service of the summons.

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NEW YORK RULES OF CIVIL PRACTICE

RULE 50. ORDER FOR SERVICE OF SUMMONS BY PUBLICATION; CONTENTS.

The order for service of a summons by publication must direct that such service be made by publication thereof in two newspapers, in the English language, designated in the order as most likely to give notice to the defendant to be served, for a specified time, not less than once in each of six successive weeks. It must also contain either a direction that on or before the day of the first publication the plaintiff deposit in a post office, or in any post office box regularly maintained by the government of the United States, one or more sets of copies of the summons, complaint and order, and of the notice required by rule fifty-two, each set properly inclosed in a postpaid wrapper addressed to the defendant to be served, and if the defendant be an infant, addressed to his father, mother or guardian or a person having the care or control of him or with whom he resides at a place specified in the order; or a statement that the court or judge, being satisfied by the affidavits on which the order was granted that with reasonable diligence the plaintiff cannot ascertain a place or places where such defendant, or any such person, probably would receive matter transmitted through the post office, dispenses with the deposit of any papers therein. * * *

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NASSAU COUNTY ADMINISTRATIVE CODE

CH. 272 LAWS OF NEW YORK 1939 AS AMENDED

§ 5-51.0 NOTICE TO OWNER BY HOLDER. A. The holder of any tax lien which is not satisfied, shall give notice to the occupant, owner in fee, trustee, mortgagee, judgment creditor or purchaser at any other county tax sale of a tax lien affecting the same property, and the heirs, legal representatives, and assigns of any or either of them, the guardian of any infants having any interest therein, and any other

person having a lien, claim or interest appearing of record on the premises affected by such sale. The words "appearing of record" shall be construed to refer to any person on whom a notice is hereby required to be served, the nature and degree of whose interest appears from the records kept by the county clerk, county treasurer or surrogate of the county.

b. Such notice may be given at any time after the expiration of twenty-one months from the date of the sale of the tax lien. Such notice shall either be printed or written or partly written and partly printed, and shall state briefly:

1. The lot or lots or parcel or parcels of land affected by the tax lien.

2. The year of the tax for which the tax lien was sold.

3. The expense of making searches thereon and serving the notice.

4. The first day upon which the holder of the tax lien may elect to accept a deed of conveyance of such property or to call his money and foreclose his tax lien, as the case may be, which date shall not be less than three months from the day of service of the same.

Such notice shall further state that the satisfaction is to be made at the office of the county treasurer at Mineola, and that in the event that such tax lien shall not be satisfied before the date for election stated in such notice, the holder shall elect to accept a deed of conveyance of such property or to call his money and foreclose his tax lien, as the case may be.

(Subd. b, amended by L. 1943 Ch. 71 § 1, in effect March 6, 1943.)

c. The notice shall be served on the parties in interest by registered mail, postage paid, return receipt requested, and addressed to such persons' last known address. The receipt of the postmaster for such registered mail or the affidavit of the person mailing it shall be sufficient evidence of the service of the notice.

d. If no information can be obtained as to the last reputed place of residence of the parties in interest or any of them, the county treasurer, upon the payment of a fee of fifty cents, shall issue a certificate to the holder of the certificate of sale of the tax lien that no taxes have been paid on the property within the last five years, by the person sought or if so paid that no address is disclosed by such payment. Upon the issuance of such certificates, service by registered mail shall be dispensed with.

e. The county treasurer, upon receiving a copy of such notice, together with an affidavit by the holder or his attorney or agent that service has been properly made pursuant to this section and stating the expenses incurred for searches and serving the notice, shall make an appropriate notation of such service and expense in his records. Such expense must not exceed twenty-five dollars and shall be collected by the county treasurer at the time of satisfaction of the tax lien as provided in section 5-50.0 of the code. Such searches may be made by an attorney or title company, or title searcher, and in the event of the foreclosure of the tax lien shall be allowed in the bill of costs. Not more than one notice, however, may be served by any purchaser of tax liens where the certificates of sale of tax liens cover lots of identical title which are contiguous. However, as many certificates of sale as the holder may wish may be included in one notice, without respect to difference in ownership, in which event the cost shall be equally apportioned by lot.

f. If such notice is not served by the holder of the certificate of sale before commencing an action to foreclose, he shall be entitled to disbursements only as provided by the civil practice act, and not to costs, provided the defendant offers to pay the penalties allowed by law at any time before final judgment is entered.

g. The validity of any deed issued by the county treasurer, pursuant to section 5-53.0 of the code, and the regularity of any proceedings prior to its delivery shall not be

affected or impaired by failure to give the notice provided for by this section, but such deed shall be as valid and effectual as if the notice had been regularly made and served. If a notice is served upon a person after the time it should properly have been served, the person so served, or his successor in interest, at any time prior to the expiration of three months from the date of service of such notice, may satisfy the tax lien upon the terms provided in section 5-50.0 of the code as if the treasurer's deed had not been issued. Similarly, any person who should have been served and was not so served or the successor in interest of such person, may, in the same manner satisfy the tax lien prior to the granting of a judgment in the action instituted pursuant to section 5-57.1 of the code. Every such satisfaction shall be as effectual as if made before the delivery of the treasurer's deed.

(Subd. g, added by L. 1939 Ch. 704 § 7, in effect June 5, 1939.)

* * * * * *

h. A notice to redeem pursuant to this section must be served or, where no notice is required to be served prior to the delivery of the deed, an application for the county treasurer's deed made, or an action to foreclose the tax lien commenced within fifteen years of the first day on which such notice could first be served or such application could first be made or such action to foreclose the tax lien could first be commenced. Unless such service is made or such application is made or action commenced within the time limited hereby, all rights of the holders of such tax lien to enforce it shall terminate and the tax lien shall cease to be a lien upon the real property described therein and the county treasurer shall mark his records accordingly. This subdivision shall apply to all certificates of sale of tax liens, whether heretofore or hereafter issued, provided, that in the case of sales where no notice to redeem is required to be served prior to the delivery of the county treasurer's deed and in all cases where the sale was held

more than eighteen years prior to the effective date of this subdivision, the time above limited shall be extended for one year from such effective date.

(Subd. h, added by L. 1948 Ch. 188 § 1, in effect March 10, 1948.)

* * * * * *

§ 5-53.0 CONVEYANCE BY THE COUNTY WHEN TAX LIEN IS NOT SATISFIED. If such tax lien is not satisfied, the county treasurer shall execute to the holder of such certificate of sale of the tax lien a conveyance of the real estate on which the tax lien has been sold. This conveyance shall vest in the grantee an absolute estate in fee, subject to all claims which the county may have thereon for tax or other liens or incumbrances. Such conveyance shall be executed only upon:

1. Performance by such purchaser of the conditions which he is required to perform pursuant to this article.

2. Surrender of such certificate of sale.

3. The taking and paying for by the holder of an assignment of all outstanding prior tax liens held by the county upon the premises.

4. The filing of proof of service of notice upon owners and other interested persons as provided by section 5-51.0 of the code.

(Amended by L. 1941 Ch. 635 § 1, in effect April 21, 1941.)

§ 5-54.0 EFFECT OF CONVEYANCE BY THE COUNTY. A. The county treasurer may demand and receive from such grantee, for the use of the county, the sum of one dollar for preparing such conveyance.

b. Every such conveyance shall be attested by the county treasurer and the seal of the county treasurer shall be attached thereto. When so executed, the conveyance shall be presumptive evidence that:

1. The sale of the tax lien was regular.

2. All proceedings prior to such sale, including the assessing of the lands affected by such tax lien were regular.

3. All notices required by section 5-51.0 of the code to be given previous to the expiration of the time allowed by that section for the satisfaction of the tax lien, were given and were regular and according to law. After six years from the date of record of any such conveyance in the county clerk's office, such presumption shall be conclusive.

c. Two or more lots or parcels of real estate may be included in the same deed of conveyance if the tax liens on such lots or parcels were sold to the same person.

* * * * * *

§ 5-57.1 ACTION TO ESTABLISH THE REGULARITY OF A TAX SALE AND THE TITLE TO REAL ESTATE RESULTING THEREFROM. a. The owner, including the county, of any specific real property in the county or of any undivided interest therein in fee, or for life or for a term of years not less than ten, whose ownership or interest originated in or is founded upon a deed of conveyance executed by the county treasurer pursuant to section 5-53.0 of the code, may maintain in the supreme court or in the county court of the county an action to compel the determination of any claim which any person makes or which, as appears, from the public records, any person might make to any legal or equitable estate or interest in such real property. Jurisdiction of such action and of all the issues raised therein is hereby conferred upon the county court of the county.

b. All of the provisions of article fifteen of the real property law shall apply to such an action, except that:

1. The plaintiff shall not be required to allege or prove that either he or his predecessor in title is or ever has been in possession of such real property.

2. The action may be maintained notwithstanding the fact that the real property is vacant and unoccupied.

c. So much of article fifteen of the real property law, however, as limits such an action to the determination of adverse claims, liens or encumbrances of a value not less than two hundred fifty dollars shall not apply to such an action, but such an action may be maintained whatever the value of the claim, lien or encumbrance sought to be determined may be; nor shall it be necessary for the complaint to set forth facts showing whether any defendant is known or unknown, and whether any defendant is or might be an infant, an idiot, a lunatic, or a habitual drunkard. Provided, however, that before the plaintiff obtains judgment, he shall be required to inform the court, by affidavit, of those facts within his knowledge that might show a defendant to be an infant, an idiot, a lunatic or a habitual drunkard.

d. But any defendant shall have the right, and the plaintiff must in such action specially plead that he extends such right to such defendant, to set aside the deed of the county treasurer and to satisfy the tax lien on which such deed was based by making a satisfaction pursuant to the terms of section 5-50.0 of the code as if no deed had been issued. In addition, such defendant shall pay to the plaintiff such actual disbursements as in the judgment of the court shall be fairly attributable to such lots or parcels, the tax lien on which has been thus satisfied. Such right of satisfaction shall terminate and cease upon the granting of final judgment. If the satisfaction be made by a municipal corporation, it may at its option, obtain an assignment of the plaintiff's title, and continue the action in its own name, as plaintiff. If the plaintiff so desires, the final judgment may be recorded as a deed in the office of the county clerk upon the payment of the recording fees. The county clerk shall index the same as if the defendant were grantor and the plaintiff grantee.

c. So much of section two hundred seventeen of the civil practice act or of article fifteen of the real property law as requires or permits the court to allow a defendant to defend an action after final judgment shall not apply to such an action.

(Added by L. 139 Ch. 704 § 9, in effect June 5, 1939.)

§ 5-57.2 Service of summons by publication in an action provided for in section 5-57.1. A. The summons may be served on the defendant by publication pursuant to an order of the court in which the action is pending, or a judge thereof. The order must be founded upon a verified complaint showing the cause of action against the defendant to be served and proof by affidavit as hereinafter required in this section.

b. Such affidavits shall show:

1. That the deponent is qualified to make personal service of the summons within the state.

2. That the deponent has been employed by the plaintiff's attorney to serve the summons on the defendant.

3. That the deponent has searched and inspected the records in the offices of the county clerk, the county treasurer and the surrogate of the county, for the purpose of making such service and ascertaining places where such defendant resides or could be found or would be likely to receive matter transmitted to him through the mail.

4. The last address of the defendant ascertained by, or otherwise known to the deponent, to the best of his knowledge and belief and a statement that his knowledge has been acquired from and his belief is founded upon his searches, and inspection of the records in the offices of such clerk, treasurer and surrogate.

5. Whether the real property affected by the action is improved or vacant, occupied or unoccupied, and if occupied, the name of the occupant, if the deponent has been able to learn such name.

c. The order for service of the summons by publication:

1. Shall direct that such service be made by publication thereof in two newspapers published in the county, designated in the order as most likely to give notice to the defendant to be served, for a specified time, not less than once in each of two successive weeks.

2. Shall contain either a direction that on or before the day of the first publication the plaintiff deposit in a post office, or in any post office box regularly maintained by the government of the United States, one or more sets of copies of the summons, complaint and order, and of the notice required by rule fifty-two of the rules of civil practice, each set properly enclosed in a postpaid wrapper addressed to the defendant to be served, at his last known address as stated in such order, and if the defendant be an infant, addressed to his father, mother or guardian or a person having the care or control of him or with whom he resides, at a place specified in the order; or a statement that the court or judge being satisfied by the affidavits on which the order was granted that the plaintiff does not know a place or the places where such defendant or any such person probably would receive matter transmitted through the post office, dispenses with the deposit of any papers therein.

(Added by L. 1939 Ch. 704 § 10, in effect June 5, 1939.)

* * * * * *

APPENDIX B

REBECCA SWIDLER et al., Appellants, v. KNOCKLONG CORP., et al., Respondents.

Argued May 19, 1953; decided July 14, 1953.

* * * * * *

Swidler v. *Knocklong Corp.*, 281 App. Div. 718, affirmed.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 5, 1953, affirming by a divided court, a judgment of the Supreme Court in favor of defendants, in an action under article 15 of the Real Property Law, entered in Nassau County upon a decision of the court on a trial at Special Term (STODDART, J.), (1) dismissing plaintiffs' complaint on the merits, (2) adjudging that defendant Gresa Realty Co., Inc., was the sole owner of certain described real property subject to a mortgage held by another named defendant, and (3) enjoining plaintiffs from claiming any interest therein.

* * * * * *

DESMOND, J. Plaintiffs Swidler and Miller, on the one hand, and defendant Gresa Realty Co. on the other, make conflicting claims to the ownership of vacant land in Nassau County. Swidler and Miller claim under a deed to their predecessors from the heirs of Katherine Laffey, a former owner who died in 1920. Defendant Gresa claims through predecessors who purchased a tax title resulting from a Laffey default in paying, and from the sale of, a school tax installment. Most simply stated, the situation is this: in December, 1948, defendant Gresa's predecessor took a tax deed which purported to wipe out the ownership of Katherine Laffey; that tax deed grantee, however, failed, after the tax sale, to give an appropriate notice to redeem, since the notice to redeem which was sent by that predecessor, was directed to Katherine Laffey, who was long

since dead; that tax deed grantee (defendant Gresa's predecessor) then started a partition action, hereinafter referred to, naming the Laffey heirs as defendants and asking that their interests if any be cut off, in which action a *lis pendens* was filed on January 20, 1949. However, the heirs of Katherine Laffey, who apparently did not know of, or who had ignored, the previous tax sale and deed, sold the property, by deed recorded January 28, 1949, eight days after the *lis pendens,* to predecessors of plaintiffs, for value. In March, 1949, defendant Gresa's predecessor, as plaintiff in the partition action above referred to, obtained an order for publication, as against the Laffey heirs; they were served by publication, and eventually a judgment was entered against them, wiping out, or purporting to wipe out, the Laffey interest.

The present action was brought under article 15 of the Real Property Law to get an adjudication that the tax title to which defendant Gresa succeeded is void for two alleged reasons: first, because the notice to redeem was never served on the Laffey heirs, but was attempted to be served on Katherine Laffey who was dead: and, second, because, as plaintiffs claim, the order and service by publication above referred to in the partition action was "void", since it was based on an affidavit that the Laffey heirs could not be found, whereas, if a more complete search of certain Nassau County records had been made, there would have been discovered the deed from the Laffey heirs recorded a few days after the *lis pendens,* and which deed contained the addresses of the Laffey heirs.

This present action was tried on undisputed basic facts, and resulted in a judgment in favor of defendants, with a brief opinion in which the Trial Justice said that the only issue was whether there had been a constructive fraud on the court, in the earlier (partition) action, in that the order of publication therein was obtained on affidavits which said that the Laffey heirs could not be located, whereas in fact the search of Nassau County records for clues as to their

whereabouts had been made only up to the time of filing the *lis pendens,* and a later search of the records would have shown the later deed from the Laffey heirs to the predecessors of plaintiffs. The trial court held that the attorney who brought that suit, in obtaining the order of publication, had not actually deceived the court, and that there was no constructive fraud, so that the judgment in that earlier action was good, and wiped out the interest of the Laffey heirs and their successors in title (plaintiffs). No opinions were written on the affirmance in the Appellate Division.

We will attempt to clarify all this, and summarize the undisputed proof, in this chronological table:

February 9, 1920—Katherine Laffey, record owner (no mortgage on property) died intestate, leaving the "Laffey heirs".

December 11, 1946—the County Treasurer of Nassau County sold these premises for unpaid second half 1946 school taxes of $51, to defendants here, Connolly and Knocklong; it seems undisputed in the record that the property was worth several thousand dollars and was afterwards sold to plaintiffs for $10,000 and to defendant Gresa for $6,000; it is undisputed, too, that defendant Connolly, one of the tax purchasers, was a sister of the special tax counsel for the County Treasurer of Nassau County, that defendant Knocklong was a corporation which had its office in the tax counsel's office, and that the lawyer who afterwards acted in the partition suit for Knocklong was a sister and office associate of the special tax counsel.

September 8, 1948—the tax purchasers attempted to serve, by mail, a three months' notice to redeem on Katherine Laffey, but, since she was dead, the notice was never delivered but was returned to the senders.

December 13, 1948—the Nassau County Treasurer gave a tax deed to Connolly and Knocklong, which was recorded January 17, 1949.

January 20, 1949—Knocklong filed the *lis pendens* and summons and complaint, in an action in County Court, Nassau County, against Connolly and the Laffey heirs, for a partition of this property (and a number of other non-Laffey parcels) between Knocklong and Connolly, asking, also, for a judgment that the Laffey heirs had no right, title or interest; it was in this County Court action that the now contested order of publication against the Laffey heirs was obtained (see below).

January 28, 1949—deed dated January 21, 1949, recorded in Nassau County, from all the Laffey heirs to Leighton, predecessor of plaintiffs, a mortgage being given back by Leighton to the Laffeys; this deed contained the residence address of the Laffey heirs, but this transaction was closed without the parties knowing of the tax sale and deed, or that there was already on file the County Court *lis pendens* and complaint above referred to, although the parties to the Laffey-Leighton sale were represented by attorneys, later tax bills received by the Laffeys showed "arrears", and a search was made of the records; actually a title searcher had found the *lis pendens* but the abstract company, it seems, paid no atention to it.

February 21, 1949—deed from Leighton to plaintiffs recorded.

March 28, 1949—affidavit filed by the attorney for plaintiff Knocklong, in the County Court suit above referred to, also an affidavit by one Keyes, both of which affidavits described elaborate efforts to locate the Laffeys, the lawyer's affidavit stating, among other things, that she had caused the Nassau County records to be searched and had found no record of any conveyance or instrument affecting the title or made by any defendant since acquisition of title: technically speaking, the lawyer's affidavit was perhaps incomplete or even, possibly, misleading, since no search had been made of the public office records after the filing of the *lis pendens;* the Keyes affidavit, however, described efforts to serve the papers, without giving dates, but neces-

sarily those were efforts made after the *lis pendens* had been filed; on these affidavits there was made an order of publication with mailing dispensed with, against the Laffeys, and there is no dispute that service by publication against them was made, as prescribed by the order.

June 22, 1949—judgment was entered in favor of Knocklong in the partition action above referred to, which judgment barred the Laffey heirs and their successors and decreed Knocklong and Connolly, the tax purchasers, to be tenants in common of the property; Knocklong afterwards conveyed its interest to Connolly.

November 9, 1949—the Laffeys made a motion to vacate the judgment just above referred to, but that motion was later withdrawn because made in the wrong court.

November 10, 1949—Connolly conveyed the premises to defendant Gresa for value; this deed was made on the day after the motion just above referred to but there is no proof or finding that Gresa knew of the alleged defects in Connolly's title.

April 24, 1950—this present action was brought in an effort to obtain an adjudication that Gresa's record title is void because of the inadequate notice to redeem from the tax sale, and because, as claimed by plaintiffs here, there was a constructive fraud on the court in the obtaining of the publication in the County Court action, in which there was a later judgment barring the Laffey's claim to the land.

The view of the trial court here was that the whole question was as to whether the publication order had been obtained by a constructive fraud on the court. The court's holding was that there was no such fraud and, apparently, the basis for that was this: the attorney's affidavit, in procuring the publication order, may have been technically inaccurate or vague in that it referred to a search of the records but did not show that such a search had been made

up to the time of the *lis pendens* only; however, as we assume, the Judge had in mind, and we may take judicial notice, that the filing of a *lis pendens* in such an action is a cut-off point, and that anything done with the title thereafter is subject to *lis pendens*, so, it would seem, a lawyer would be justified in asking for an order of publication on the basis of information available up to the time of the *lis pendens* filing. There is no dispute here as to the testimony that a search of records up to the *lis pendens* date only, and the use of this form of affidavit, represented customary practice in Nassau County in such cases. There is no claim here that there was any other constructive fraud on the court and the affidavit of the attorney, and that of Keyes, on which the order of publication was granted, show an elaborate but unsuccessful search for the Laffey heirs. Of course, it is true, as it always must be true as to actually living persons, that sufficient further search (such as inquiring from lawyers who had represented them years before, etc.) would have found them, but that objection could be made as to any order of publication against missing persons.

Cases like *Valz* v. *Sheepshead Bay Bungalow Corp.* (249 N. Y. 122) say that the failure to make due service by publication may (it did not in that case) void a judgment affecting real property, and that such voidness may be established, collaterally, in a separate action like the present one. However, the *Valz* opinion itself points out that, on such a collateral attack in an action like the present one, the question is whether the prior judgment was so far invalid as to amount to a denial of due process. That question has been decided in this present action by both courts below in favor of the validity of the service in the prior action, and we could not hold, as matter of law, that the affidavits on which the publication order was obtained were so fraudulent as to make the order itself, and the subsequent service and judgment, nullities. The affirmed finding below is that there was no fraud at all.

The Trial Term held, and appellants practically concede here, that they are not entitled to succeed in this action unless they have established that the attorney's affidavit on which the order of publication was granted was so fraudulent as to make the order of publication and the service pursuant to it, and the judgment entered thereon, absolutely void. To get judgment here they had, of course, to do much more than show that a better or more complete search for the Laffey heirs could have been made, or that the affidavit was not sufficiently definite as to facts, or that the Special Term which granted it could have rejected it as insufficient, and asked for more proof. The affidavit, it seems to us, was, on its face, a sufficient basis for an order of publication and so the publication order was not jurisdictionally defective (see discussion in *Kennedy* v. *Lamb,* 182 N. Y. 228, and cases cited therein). It must be remembered that this is a collateral attack, by action, on a judgment in another cause, and the plaintiffs have the heavy burden of establishing that, in issuing the order of publication, the County Court was defrauded (see *Reich* v. *Cochran,* 105 App. Div. 542, 553 *et seq.*). There is strong authority in this court (*Ward* v. *Town of Southfield,* 102 N. Y. 287, 293) that for a successful collateral attack, by action, on a judgment there must be a clear and satisfactory proof of actual, and not constructive, fraud.

Appellants place principal reliance upon *Lapiedra* v. *American Sur. Co.* (247 N. Y. 25) but the situation there was quite different. There the Surrogate, on an allegation that an administrator had been removed, appointed a new administrator, whereas in fact the previous administrator had never been removed at all. This court quite properly held that, since the removal of the former administrator was the sole necessary jurisdictional fact for the appointment of a successor, the appointment of a successor by the Surrogate, on his mistaken belief that there was a vacancy, was a wholly void judicial act. We do not see the pertinence of that case here.

Appellants argue also, as pointed out above, that the original tax deed was void, since no proper notice to redeem was ever served, and argue that the judgment in the partition action could not remedy that defect, particularly since the holders of the tax deed or their successors did not bring such an action for validation of a tax deed, as is prescribed and described in section 5-57.1 of the Nassau County Administrative Code (L. 1939, ch. 704). As to the first of those contentions, that is, that the tax deed itself was void because of a failure to serve the notice to redeem on living persons, the answer seems to be in subdivision g of section 5-51.0 of the Nassau County Administrative Code which says specifically that the validity of such a deed shall not be affected or impaired by the failure to give notice to redeem, but that the time to redeem shall continue until the entry of judgment in a so-called code action under section 5-57.1. The best that appellants can claim, from this situation, is that because of the failure to give the notice to redeem or to bring a "Code action", their time to redeem is still running, possibly, but it is the undisputed fact here that appellants have never attempted or offered to redeem and are not doing so now. The present action is brought under the theory that defendants simply have no title at all. It is true that, instead of the partition action, the tax purchasers could have brought a "Code action", and that in that action they would have (by statute) been required to give the former owners an opportunity to redeem. However, the tax purchasers were under no obligation to bring a so-called "Code action" since, as the Nassau County Administrative Code itself says, (*supra*) their deed was valid despite the failure to give notice to redeem. The prime question therefore is whether the judgment in the partition action barring the Laffey heirs was good against collateral attack. We are convinced that it was. We see no reason to doubt that, despite the statutory provisions for a "Code action", any alleged rights of former owners might be barred in a

partition action, as they could be in a mortgage foreclosure action, or any other appropriate form of suit. The Nassau County Administrative Code does not limit a tax deed grantee to a code action, but is permissive.

Appellants here make much of what might be considered suspicious circumstances such as the relationship between Hurley, the special tax attorney, the attorney for plaintiff in the partition suit, and Connolly and Knocklong, and the failure of the latter attorney to examine county records after the *lis pendens*, but no proof of actual fraud was attempted except as plaintiffs sought unsuccessfully to have inferences drawn from the records and these circumstances; they were met with proof, which the courts below accepted, that there was no actual or constructive fraud, that the failure to search these records for the period between January and March, 1949, was customary, and that its dire results here were due not to any fault on the part of the attorney in the partition action, but to the unaccountable failure of title examiners to note, or act upon, defects appearing in the direct chain of title, since not only the tax deed, but the *lis pendens* naming the Laffey heirs had been filed and indexed before the predecessors of plaintiffs took title. Respondent Gresa says that these facts bring into play the rule of *Deyo* v. *Hudson* (225 N. Y. 602) and similar cases, that where one of two innocent persons must suffer from the fraud of the third, the loss must fall on the one principally at fault for letting the third party do the injury (see *Van Schaick* v. *National City Bank*, 245 App. Div. 525, affd. 271 N. Y. 570; and *Industrial Bank of Commerce* v. *Packard Yonkers Corp.*, 304 N. Y. 622). In other words, respondent Gresa says that both Gresa and plaintiffs are innocent purchasers for value, but that both acted on separate mistakes of fact and that if there was any fraud (none was found here), then plaintiffs and their predecessors were principally to blame for the ultimate results thereof, in that they overlooked or ignored the tax deed and the *lis pendens*. But this "innocence" doctrine is

rather a vague one, and its application to the present facts is not free from doubt, so we do not rely on it.

The judgment should be affirmed, with costs.

Lewis, Ch. J., Dye, Fuld, Froessel and Van Voorhis, JJ., concur; Conway, J., concurs in the result upon the ground that the jurisdictional defect claimed to have been present in the partition action does not appear upon the face of the record there and thus, being latent, may not be reached by collateral attack in an independent action.

Judgment affirmed.

STATE OF NEW YORK,
IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-second day of October A. D. 1953.

Present, Hon. Edmund H. Lewis, *Chief Judge, Presiding.*

Mo. No. 428

Rebecca Swidler & ano.,
Appellants,

vs.

Knocklong Corp., & ors.,
Respondents.

A motion for reargument and for a stay or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein, and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion, insofar as it seeks reargument and a stay, be and the same hereby is denied with ten dollars costs and necessary printing disbursements, and it is

Further ordered, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of remittitur requested and, when returned, it will be amended by the addition of the following:

A question under the Federal Constitution was presented and necessarily passed upon by this Court, viz.: Whether the judgment herein, by permitting, as claimed by plaintiffs, the prior partition action judgment to validate the tax deed which had been obtained without notice to the owners, although the order for service by publication of the summons in the partition action dispensed with mailing the summons, constituted the taking of property without due process of law, in violation of the Fourteenth Amendment to the Constitution. This Court held that there was no such violation.

And the Supreme Court, Nassau County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment acordingly.

A copy

Gearon Kimball,
Deputy Clerk.